APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. RALPH M. RENTZ, Defendant/Appellant.	C.A. No. 81-1429 D.C. No. 81-0016 (R.M.T.) MEMORANDUM

Appeal from the United States District Court for the Central District of California, Robert M. Takasugi, District Judge, Presiding
Argued and submitted April 5, 1982

Before: WALLACE and NORRIS, Circuit Judges, and JAMES M. BURNS,* District Judge

Ralph Rentz, a certified public accountant, appeals his conviction of, first, conspiring to submit, and second, aiding and abetting the submission of false financial statements to the Small Business Administration (SBA) and a federally insured bank to obtain a loan, in violation of 18 U.S.C. §§ 2, 371 and 1014.

In 1974 Rentz was hired by Grant Meeks, president of a perennially unprofitable company called California Custom Vinyl (CCV), to perform accounting tasks and to help obtain an SBA-guaranteed loan. Under the loan program, the federal government guarantees loans made by banks to small businesses that

have demonstrated the ability to earn profit but cannot qualify for regular financing. Rentz prepared a financial statement, based on sales recorded in the company ledger, that showed a $23,000 loss for the five months ending February 1975. By fall 1975, Rentz and Meeks had tried unsuccessfully for a year to find a bank that would recommend CCV for an SBA-guaranteed loan.

After realizing the dire financial position of CCV, Rentz prepared the first of six false financial statements submitted in support of efforts to obtain a $28,000 SBA-guaranteed loan from a bank in Los Angeles. Based on inflated sales figures given to Rentz orally by Meeks, the statement reported a dramatic reversal of CCV's fortunes, showing a $75,000 profit from February 1975 to August 1975. The tax return for FY 1975, sent to the Internal Revenue Service three days after the loan agreement between CCV and the bank was signed (December 1976, a year late), showed a $74,000 loss. Four more false financial statements were submitted to SBA and the bank during the time

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*Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

the loan was under consideration. Further, Rentz accompanied Meeks to several meetings with bank officials, explaining the financial statements and helping to persuade them to make the $280,000 loan.

Eventually successful, CCV received $205,000 of the loan in January 1977. In March Rentz prepared another financial statement, showing profits through September 1976, so CCV could obtain the remaining $75,000 of the loan, which it did in April 1977. Five months later, CCV defaulted.

Rentz was interviewed by an SBA financial investigator in May 1979 and was indicted in January 1981. Facing similar charges, Meeks pled guilty and testified for the government at trial. Rentz was convicted in May 1981. This appeal followed.

Rentz urges error in three respects:

1) Incurable prejudice to the jury because of the erroneous reading to the jury of an inapplicable statute;

2) Error in jury instructions given on the issue of willful blindness; and,

3) Insufficient evidence to support the verdict.

None of these contentions is meritorious, and therefore we affirm.

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A. INAPPLICABLE STATUTE

The generally accepted rule in this circuit is that non-constitutional errors are measured against the more-probable-than-not standard. United States v. Valle-Valdez, 554 F.2d 911, 916 & n.9 (9th Cir. 1977). See also United States v. Hammond, 663 F.2d 435 (9th Cir. 1982); United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), cert. denied, 102 S.Ct. 1031 (1982); United States v. Berry, 627 F.2d 193 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); United States v. Castillo, 615 F.2d 878 (9th Cir. 1980); United States v. Indian Boy X, 565 F.2d 585 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978). But see United States v. Rea, 532 F.2d 149 (9th Cir.), cert. denied, 429 U.S. 837 (1976) United States v. Duhart, 496 F.2d 941 (9th Cir.), cert. denied, 419 U.S. 967 (1974). Errors in jury instruction usually are not considered errors of constitutional dimension. Valle-Valdez, 554 F.2d at 916. Therefore, even if error occurred, it is harmless unless it is more probable than not that the error materially affected the verdict. Id. at 915.

After the trial in this case, the judge met with counsel to determine the jury

capable of being disregarded. See Verdugo v. United States, 402 F.2d 599, 606-607 (9th Cir. 1968), cert. denied, 402 U.S. 961 (1971). Therefore, we find no overwhelming prejudice.

Because we find that any prejudice resulting from the reading of the inapplicable statute could be cured, we also reject defendant's claim that withdrawing the statute and admonishing the jury to ignore it did not remedy the error. Assuming defendant preserved the right to challenge the sufficiency of the curative instruction, we hold that the action taken by the judge left no doubt in the jurors' minds as to applicable law and sufficiently eliminated any prejudice that otherwise might have lingered. United States v. Collom, 614 F.2d 624, 632 (9th Cir. 1979), cert. denied, 446 U.S. 923 (1980). C.f. United States v. Sandy, 421 F.2d 182, 183 (9th Cir. 1970). Compare United States v. Sharpe, 452 F.2d 1117, 1119 (1st Cir. 1971) (no reversible error where incorrect instruction on the law withdrawn in emphatic terms), with United States v. Perl, 584 F.2d 1316, 1323-1324 (4th Cir. 1978) (reversible error where curative instruction was not sufficiently clear and unequivocal), cert.

denied, 439 U.S. 1130 (1979). This assignment of error lacks merit.

B. WILLFUL BLINDNESS INSTRUCTION

The trial court instructed the jurors that they could find defendant knew the statements were false if they were convinced beyond a reasonable doubt that he was willfully blind to the falsity of the statement made to the bank and the SBA.[2/] Defendant contends the evidence was insufficient to warrant giving such an instruction and, in any case, the instruction given was inadequate.

This circuit approved a willful blindness instruction in United States v. Jewell, 532 F.2d 697 (9th Cir.)(en banc), cert. denied, 426 U.S. 951 (1976), and noted acceptance of such an instruction in prosecutions under other criminal statutes that prohibit "knowing" conduct. Id. at 702-703. A willful blindness instruction is appropriate in those occasional cases in which the defense theory is that defendant lacked guilty knowledge and the facts point in the direction of deliberate ignorance. See United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980). See also United States v. Nicholson, No. 81-1104, slip op. at 1904 (9th Cir. May 10, 1982); United States v. Murrieta-Bejarno, 552 F.2d 1323, 1325 (9th Cir. 1977). Both criteria are present in

the instant case. Defendant's theory was that he did not know the financial statements were false, and the evidence, viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), pointed convincingly in the direction that defendant kept himself in state of deliberate ignorance. Defendant's junior accountant warned him repeatedly that profits reported in the financial statements were suspicious. Defendant was a CPA who had unsuccessfully sought financing for his client on earlier occasions. He knew the company was in deperate financial condition. The company's amazing reversal of fortune was based entirely on oral information from the corporate ledger used by defendant to prepare a previous statement. Defendant's co-conspirator had commented that the financial statements must show a profit in order for the company to obtain financing. Defendant continued to prepare and update statements after his junio accountant, upon preparing tax returns showing substantial losses, informed him that the company had lost money. These facts clearly justify the giving of willful blindness instruction.[3/]

Even if a willful blindness instruction were appropriate, defendant contends, the

instruction was deficient because it did not include language requiring the jury to find that defendant was aware of the high probability that the financial statements were false. Such a finding assures that a jury will not convict a defendant who does not have the requisite guilty knowledge and who merely avoids learning the truth. See United States v. Valle-Valdez, 554 F.2d at 703-704 & n.21.

In this instance, however, defendant neither requested that specific language nor objected to its absence. Indeed, the record shows that the government offered to include the "awareness of high probability" language but that defense counsel steadfastly clung to their own version, which did not include the crucial phrase from Valle-Valdez. Under these circumstances defendant cannot object to an error that he invited. United States v. Katzman, 461 F.2d 655, 656 (9th Cir. 1972).

Assuming defendant may assert error not raised at trial, even though the error was invited, he must show plain error. United States v. Hall, 650 F.2d 994, 998 (9th Cir. 1981). Fed. R. Crim. P. 30, 52(b). We are not convinced that omission of the "awareness of high probability" language was plain

error under these circumstances. We believe the "awareness of high probability" requirement was implicit in the instructions given. See generally Jewell, 532 F.2d at 704 n.21. First, for Rentz deliberately to close his eyes "to what would otherwise have been obvious to him" is the equivalent of Rentz being aware of the high probability that the financial statements were false. See United States v. Callahan, 588 F.2d 1078, 1082-1083 (5th Cir.), cert. denied, 444 U.S. 826 (1979). Second, as in United States v. Weiner, 578 F.2d 757, 786-787 (9th Cir.), cert. denied, 439 U.S. 981 (1978), the jury was instructed that it could not convict Rentz if it found he acted through mere negligence, mistake, error, poor judgment, mismanagement, or in good faith. By convicting Rentz, the jury necessarily found bad faith, or the awareness of impropriety, as well as the deliberate avoidance of knowledge also required by Valle-Valdez. Id. at 787. Accordingly, we find no plain error.

C. SUFFICIENCY OF THE EVIDENCE

Finally, defendant contends the evidence was insufficient to sustain a conviction because at best it showed incompetence or

gross negligence rather than guily knowledge. Viewing the evidence in the light most favorable to the government, Glasser, 315 U.S. at 80, we reject defendant's claim. The testimony of defendant's assistant showed that defendant knew the financial statements were false or at the very least chose not to learn of their falsity. Defendant was an experienced CPA, and testimony by a government expert demonstrated the responsibility of a CPA to investigate possible false statements. Further, defendant had worked unsuccessfully with the company for more than a year to secure a loan before the false statements were made. Under these circumstances a jury could rationally believe beyond a reasonable doubt the government's theory that defendant knew what was occurring. Jackson v. Virginia, 443 U.S. 307, 319 (1979). We defer to the credibility assessments of a jury, United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981), and the jury's finding that defendant knew of the falsity of the statements is not clearly erroneous. Id.

For the foregoing reasons, the conviction is AFFIRMED.

1/ The withdrawal of the instruction and accompanying admonitions by the Court were as follows:

> THE COURT: Ladies and gentlemen, during the course of reading the jury instructions, the Court did err in reading Section 1503 of Title 18 United States Code. You are instructed to totally disregard that recitation of Section 1503 as being totally inapplicable to the case before us.
>
> Just to make certain that you understand the content of Section 1503, I will read at this time the section and indicate to you that it is inapplicable to this particular case.
>
> Section 1503 of Title 18 United States Code provides in part as follows:
>
> Whoever corruptly . . . endeavors to influence, intimidate or impede any . . . officer in or of any court of the United States . . . in the discharge of his duty . . . or corruptly . . . influences, obstructs or impedes, or endeavors to influence, obstruct or impede the due administration of justice . . . and so forth --
>
> That section will be completely disregarded.
>
> As I previously indicated, that was an error on the part of this Court.
>
> Thank you very much.

(RT 733-734) (Emphasis added to words of which appellant complains.)

2/ The court instructed the jury as follows:

> The element of knowledge may be satisfied by inferences drawn from proof beyond a reasonable doubt that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment could permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.
>
> It is entirely up to you as to whether you find beyond a reasonble doubt any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.
>
> It is not enough, of course, merely to establish that Mr. Rentz acted negligently or through error or mistake. Under our system of laws men are not punished criminally for mere mistakes in judgment, mismanagement, negligence, or errors of judgment. They are punished only for intentional wrongdoing. Mr. Rentz is not on trial here for errors or judgment or mistakes or mismanagement but is on trial for criminal offenses, and an essential element of each offense is criminal intent. If the government fails to prove criminal intent to your satisfaction and beyond a reasonable doubt, you must find Mr. Rentz not guilty.

Good faith, that is to say, an honest belief by Mr. Rentz in the truth of any oral or written representations he has made either to the Chartered Bank of London or to the Small Business Administration with respect to the financial condition of CCB would constitute a complete defense. In addition, good faith, that is, an honest belief by Mr. Rentz in the representations of his client Grant Meeks as to the sales and profits of CCB would constitute a complete defense.

Thus, if the evidence leaves you with a reasonable doubt as to whether the accused in good faith either believed the representations of his client Grant Meeks as to the financial condition of CCV or whether Mr. Rentz had an honest belief in the truth of any representations he made to the Chartered Bank of London or the Small Business Administration, you must acquit Mr. Rentz.

3/ Defendant attempts to distinguish his situation from that of auditors in United States v. Weiner, 578 F.2d 757 (9th Cir. 1978), cert. denied, 439 U.S. 981, where this circuit upheld giving a willful blindness instruction with respect to accountants whose company published false financial statements. Weiner involved a certified audit, and defendant here produced an unaudited financial statement. We cannot and do not distinguish between certified and uncertified audits for application of the willful blindness doctrine, i.e., for the purpose of determining whether defendant knew or deliberately chose not to learn that the financial statements were false.

APPENDIX B

Due Process Clause, U. S. Const. Amend. 5

"No person shall be held to answer for a capital, or otherwise infamous crime. . . nor be deprived of life, liberty, or property, without due process of law;"

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